

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 355

**INTERNATIONAL HARVESTER COMPANY AND
INTERNATIONAL HARVESTER COMPANY OF
AMERICA,**

Appellants,

vs.

**DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERT-
SON, AND FRANK G. THOMPSON, AS MEMBERS OF AND CON-
STITUTING THE BOARD OF DEPARTMENT OF TREASURY.**

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

**STATEMENT OF MATTERS AND GROUNDS MAKING
AGAINST THE JURISDICTION OF THIS COURT
AND MOTION TO DISMISS OR AFFIRM.**

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AGAINST THE JURISDICTION OF THIS COURT.**

**The Record Fails to Show That the Validity of Any State
Statute On the Ground of Its Being Repugnant to the
Constitution of the United States Was Decided in Favor
of Such Validity by the Supreme Court of Indiana.**

As stated in appellants' "Statement as to Jurisdiction"
(p. 3) the Indiana Gross Income Tax Act, here involved, con-
tains as section 6, a specific exemption of

"So much of such gross income as is derived from business conducted in ~~commerce between this state and other states~~ * * * to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States * * *."

This exemption is co-extensive with the constitutional prohibition. If the taxing authorities and the State Supreme Court erroneously transgressed the bounds of the State's taxing power, they did so without statutory authority. It is an unconstitutional application of the laws that is complained of, not an invalidity of the statute itself.

In such cases section 237 (a) of the Judicial Code (28 U. S. C. 344 a) under which appellants here proceed is not the proper remedy for correction of the error of the Supreme Court of Indiana by this Court. Such section 237 (a) grants the right of appeal only,

"* * * where is drawn in question the *validity* of a statute of any state, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, * * *."

Since the applicability and not the validity of the Indiana Statute is involved, the papers whereon this appeal was allowed should be regarded and acted upon, if considered at all, as an application to this Court for a writ of certiorari to the Supreme Court of Indiana, as provided in Section 237 (c) of the Judicial Code (28 U. S. C., 344 c).

II.

The Record Does Not Present for Decision Any Substantial Federal Question.

A.

Appellants' Contentions Are Foreclosed by Previous Decisions of this Court Applying the Indiana Gross Income Tax to Similar Transactions.

The application of the Indiana Gross Income Tax to transactions with direct or incidental interstate elements has been before this Court on several different occasions in recent years.

The case of *J. D. Adams Mfg. Co. v. Storen* (1938) 304 U. S. 307, 82 L. Ed. 1365, 58 S. Ct. 913, concerned sales by an Indiana manufacturer where the contract of sale was made subject to approval of the home office of the appellant, but the sale itself was consummated by shipment to the purchaser in another state. This Court held the receipts from such sales to be exempt from tax by virtue of the commerce clause of the Constitution of the United States. Appellants quote from this case at length in their statement as to Jurisdiction and rely heavily upon it.

In *Department of Treasury of Indiana v. Wood Preserving Co.* (1941, 313 U. S. 62, 85 L. Ed. 1188, 61 S. Ct. 885, the sales in question were made by appellee, a foreign corporation, pursuant to a contract of sale negotiated and entered into in Pennsylvania. The sales themselves were consummated in Indiana by delivery to the purchaser who immediately and by previous arrangement and intent, shipped the goods out of the State for processing.

In principle the facts of that case are identical with the facts in the Class D sales in the case at bar. In each the seller was a foreign corporation; the contract of sale was negotiated and entered into at an office of the seller out of the State of Indiana; but the sale itself was consummated by delivery within the state; and the purchaser immediately and pursuant to pre-arrangement transported the goods out of the State and the sale price was paid in another state.

This Court held such sales to be taxable as against contentions similar to those advanced by the appellants herein to the effect that such tax was prohibited entirely by the commerce clause and was invalid under the Fourteenth

Amendment for want of apportionment. This Court expressly distinguished *Adams Manufacturing Co. v. Storen*, *supra*, upon the ground that in the *Wood Preserving Case* (as here) the seller and the buyer were both present in Indiana and the actual sale was made as an intra-state transaction in Indiana. This Court further held that neither the fact that the prior orders were received by the seller out of the state nor the fact that the purchase price was paid outside of the state affected the fact that the sale was in essence an intra-state sale taxable as an activity of the seller within the state, without apportionment. The court held the tax to be validly assessed against an activity within the state.

In *Allied Mills v. Dept. of Treasury* (1942), — U. S. —, — L. Ed. —, 63 S. Ct. 666, this Court *per curiam* affirmed the judgment of the Supreme Court of Indiana (— Ind. —, 42 N. E. (2d) 34). The opinion of the Indiana Supreme Court shows that the sales there involved, like the sales in Class E. herein, arose from orders taken in Indiana and consummated by delivery from another state into Indiana. That court held that *Adams Manufacturing Co. v. Storen*, *supra*, and like cases precluded the taxation of such transactions by other states and, consequently, the problem of multiple taxation was not involved. It further held that the State where the sale was consummated by delivery to the buyer could tax.

This Court affirmed *per curiam* on authority of *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U. S. 70, 60 S. Ct. 404, 84 L. Ed. 584 and *Felt & Tarrant Co. v. Gallagher*, 306 U. S. 62, 59 S. Ct. 376, 83 L. Ed. 488. In the former case the basis of the court's decision sustaining the tax is revealed in the statement,

“ . . . the tax was imposed on all sales of merchandise for which orders were taken within the city

and possession of which was transferred to the purchaser there."

In the latter case the court rested its decision upon the fact that by the sale the property sold became a part of the common mass of property within the state and lost its interstate character.

The logical construction to be placed, then, upon *Allied Mills v. Department of Treasury, supra*, is that where possession of the article sold is transferred to the purchaser within the state so that by such delivery the property sold becomes a part of the general mass of property within the state, such sale is taxable by the state and the technicality as to whether the tax is a sales or use tax levied upon the buyer or a gross receipts tax levied upon the seller is not determinative.

The conclusion from these three cases on the Indiana Gross Income Tax, that the state where the sale is consummated by delivery may tax and that such delivery is the taxable event, not only harmonizes these three decisions, but leads to a logical and practical solution of the problem. Commercially, goods are not in competition in the state where the contract of sale is made, but rather in the state where they are delivered. Until delivery is made or tendered the sale is inchoate.

This rule, as shown by its application in *Adams Manufacturing Co. v. Storen, supra*, is adequate protection against multiple taxation of this transaction by different states. True, if the purchaser presently or in the future transports the goods to some other state for use, such use might under some circumstances be taxed by the state where used. But this is not a tax on the same activity and, if possibility of a future use tax be held to be a bar to taxation in the state of sale, state taxation of sales could be greatly embarrassed. Many instances can be found in the case of durable

goods, or even non-durable goods, where it cannot with certainty be said that these goods will not be used in some other state having a use tax. Even shoppers at retail stores could claim to be residents of other states in order to gain exemption of tax: Effective audit and enforcement would be almost impossible. The path would be opened to wholesale evasion. Such chaos is not socially desirable when the state of delivery rule is logical, practical, and constitutionally available.

The taxable event in each of the classes in the case at bar is the sale consummated by delivery to the purchaser in the State of Indiana. Under the rule established by the above cases in particular reference to the Indiana Gross Income Tax, such a taxable event is wholly intra-state and each of appellants' assignments of error is foreclosed by the decisions of this Court in those cases.

B.

Appellants' Contentions are Foreclosed by Previous Decisions of this Court with reference to Sales, Use, and other Taxes.

Appellants seek to avoid the effect of the decisions of this Court concerning sales taxes on goods imported for the purpose of sale by drawing a distinction between such sales taxes and the Indiana Gross Income Tax. The distinction which they attempt is that the sales tax is levied against the buyer while the Indiana Gross Income Tax is levied against the seller. In *City of New York v. Feiring, Tr.* (1941), 313 U. S. 283, 85 L. Ed. 1323, 61 S. Ct. 1028, this Court discussed such a claim in connection with priority rights of a claim for sales tax in bankruptcy and held that, since both the seller and buyer were equally liable for an unpaid tax, it is a tax upon both. The specific point was

that it was a tax upon the seller and was entitled to priority in his bankruptcy.

The claim of distinction is unsound also because it does not recognize that the determination of this question does not depend upon legal niceties. As stated in *Wisconsin v. J. C. Penney Co.* (1940), 311 U. S. 435, 85 L. Ed. 267, 61 S. Ct. 246:

"The Constitution is not a formulary. It does not demand of States strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

Where sales are consummated by delivery within the state, rights, privileges, duties and obligations arise and become fixed by the laws of that state. The property sold enters the general mass of property within that state and is equally protected by its laws. This, not the technical incidence of the tax is the true test.

A rule may sometimes be best illustrated by its exceptions. In *McGoldrick v. Gulf Oil Corp.* (1940), 309 U. S. 414, 84 L. Ed. 840, 60 S. Ct. 664, an act of Congress permitted delivery of "Bonded" oil only for the specific purpose of export and specifically prevented the oil from becoming a part of the general mass of property within the State. This Court held the transaction exempt from the tax. On the other hand *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 84 L. Ed. 565, 60 S. Ct. 388, held

that essentially similar sales not so bonded and not withheld from the general mass of property within the state were taxable. In each of these cases fuel was delivered from another state directly into the bunkers of ships located at docks in New York. This Court stressed heavily in its opinion in the former case that the Federal Acts prevented the property from becoming part of the general mass of property within the state and that, therefore, the *Berwind-White* case did not apply. The companion case of *McGoldrick v. Compagnie General Transatlantique* (1940), 309 U. S. 430, 84 L. Ed. 849, 60 S. Ct. 670, clearly indicates this distinction in that there the taxpayer, on facts identical with *McGoldrick v. Gulf Oil Corp.*, *supra*, presented only the question of interstate commerce and this Court held that in the absence of a contention that the Federal act had withdrawn the property from the general mass of goods within the state, the *Berwind-White* case would apply.

The decisions of this Court have firmly established the rule that the state where a sale is consummated by unconditional delivery to the buyer may tax that sale. *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, "Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption"; *Southern Pacific Co. v. Gallagher*, (1939), 306 U. S. 167, "We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation." Cf. *McGoldrick v. Felt & Tarrant Mfg. Co.* (1940), 309 U. S. 70; *Felt & Tarrant Mfg. Co. v. Gallagher* (1939), 306 U. S. 62.

In each of the three classes of sales here involved unconditional delivery was made to the buyer in Indiana. This was essentially an intra-state transaction taxable by Indiana as such.

C.

Previous Decisions by this Court Have Held the Distinctions Proposed by Appellants between the Case at Bar and the Above Cases to be Invalid and Not Controlling.

1.

Appellants propose the distinction that in the case at bar their agents within the state who made delivery had no right to and did not negotiate the contract of sale.

This is entirely a matter of intra-corporate organization and departmentalization. Appellants cannot avoid its tax burden by departmentalizing its business. *Nelson v. Sears-Roebuck & Co.* (1941), 312 U. S. 359; *Nelson v. Montgomery Ward & Co.* (1941), 312 U. S. 373. It is enough that some of their employees were in Indiana representing it in the course of business which it is conducting. *Nelson v. Montgomery-Ward & Co.*, *supra*; *Department of Treasury v. Wood Preserving Co.* (1941), 313 U. S. 62.

It will be noted that the only extra-state element present in Class C. sales herein was the fact that *due to the departmentalization of appellants' business* the orders were sent by appellants' solicitors to their out-of-state branches, but appellants took the orders and made delivery in Indiana. Thus, the above cases preclude appellants from using such departmentalization as a basis for escaping tax.

2.

We have already pointed out the controlling effect of *Department of Treasury v. Wood Preserving Co.* (1941), 313 U. S. 62, against appellants' contention that the buyer's intent to transport the goods in Class D out of the state distinguished this class from the general rule. (*See II. B supra.*) This Court has on other occasions denied the

validity of this contention. In *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, the fuel involved was loaded in the bunkers of ships for transportation to and consumption on the high seas. In *Superior Oil Co. v. Mississippi* (—), 280 U. S. 390, oil was sold for use in another state. In each instance this Court held that the buyer's intended use of the goods sold was inconclusive. In *U. S. v. Sutherland* (1935), 9 Fed. Supp. 204, at p. 207, the Court aptly said:

"When a lumber merchant or any other type of merchant or one not a merchant sells a thing in the State of Missouri to a resident of Missouri, that transaction certainly is altogether intrastate. If the person to whom he sells is a resident of Iowa and will take the thing purchased to Iowa, the transaction between the vendor and vendee still is altogether intrastate. The transaction is completed when the sale is made. What the purchaser does with the thing bought certainly cannot affect the nature of the transaction between him and the seller. The purchaser, indeed, is engaged in interstate commerce if he transports the thing bought to another State, but the seller is not. *It is impossible to elaborate a truth so simple.*"

That the buyer intended to transport the goods purchased into another State; that the buyer intended to re-sell them or that the buyer had any particular intent, is, therefore, wholly immaterial.

3.

Appellants attempt to distinguish *Class E* sales upon the basis that the goods were shipped into Indiana before the sale pursuant to prior order, citing *Sonneborn Bros. v. Cureton* (1922), 262 U. S. 506. But that case expressly distinguished between a tax against interstate commerce alone and a tax levied against interstate and domestic commerce alike and denied any effect to the original package rule. Cf. *McGoldrick v. Berwind-White Coal Mining Co.* (1940),

309 U. S. 33, where the goods sold were imported into New York from other States pursuant to prior order.

4.

Appellants point to the possibility that the State of Ohio might tax the use of some of the goods included in Class D. It does not appear at any point in the record that any such tax was actually levied. "It will be time enough to resolve that argument when a taxpayer paying in the state of origin is compelled to pay again in the state of destination." *Southern Pacific Co. v. Gallagher* (1939), 306 U. S. 167 citing *Henneford v. Silas Mason Co.*, 300 U. S. 577, 587.

Such a use tax is upon an entirely different transaction and would equally apply to a wholly intrastate sale where the buyer, after purchase and without any previous intent to do so, transported the property sold into Ohio and there used it.

One of the stipulations of the parties upon the trial of this cause was:

"(j) The gross receipts involved in this suit for refund were not taxed, and were not used as the measure of any tax assessed, in any other jurisdiction than the State of Indiana, and no tax has been paid by the Plaintiffs to any taxing jurisdiction other than the State of Indiana upon these identical gross receipts or which was measured by them."

Stipulation 40 (j), Rec., pp. 95-96.

Summary.

The Decision of the Supreme Court of Indiana Being in Strict Accord With Previous Decisions of This Court, No Substantial Federal Question Is Presented.

Three categories of sales are involved in this cause. In each instance appellants' propositions are directly foreclosed by previous decisions of this Court.

In Class C sales the only extrastate element involved was that due to the intra-corporate departmentalization of appellants' business; the orders taken from Indiana residents were routed through one of appellants' out-of-state branches to appellants' Indiana factory where delivery was made. Appellants cannot escape taxation by departmentalizing their business. Class C sales are taxable.

Nelson v. Sears-Roebuck & Co. (1941), 312 U. S. 359;
Nelson v. Montgomery Ward & Co. (1941), 312 U. S. 373;

Department of Treasury v. Wood Preserving Co. (1941), 313 U. S. 62.

Class D sales were those in which the purchaser resided outside the State of Indiana and the contract of sale was there negotiated but the sale was consummated by delivery in Indiana. Previous decisions of this Court directly hold such sales to be taxable by Indiana.

Department of Treasury v. Wood Preserving Co. (1941), 313 U. S. 62;

Superior Oil Co. v. Mississippi (1930), 280 U. S. 390.

Class E sales were those in which the only extra-state element was that the goods were delivered in Indiana by shipment from an out-of-state point. This Court has directly held that such shipment does not relieve the sale from taxation.

Allied Mills v. Dept. of Treasury (1942), — U. S. —, — L. Ed. —, 63 S. Ct. 666;

McGoldrick v. Berwind-White Coal Mining Co. (1940), 309 U. S. 33.

The Supreme Court of Indiana compared the cases of *Adams Mfg. Co. v. Storen* (1938) 304 U. S. 307, and *Allied Mills, Inc. v. Dept. of Treasury* — U. S. — — L. Ed. —, 63 S. Ct. 666, and correctly held that the State where a

sale is consummated by delivery may tax the receipts from such sale. It has herein been shown that this decision in this cause is in strict accord with the principles established by this Court and that there is no valid basis for distinguishing this cause from the decisions in which this Court established such principles. Consequently, there is no substantial Federal question involved and thus appellees' motion to dismiss or affirm, filed herewith, should be sustained. *J. Bacon & Sons v. Martin* (1939), 305 U. S. 380, or this appeal should be treated as a petition for a writ of certiorari under section 237.(a) of the judicial code and such petition should be denied for want of a substantial Federal question.

Respectfully submitted,

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

**MOTION TO DISMISS APPEAL OR AFFIRM DECISION
OF STATE COURT.**

Now come appellees, Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as members of and constituting the Board of Department of Treasury, and move to dismiss the appeal herein on the ground that the case presents no substantial Federal question, and they further move,

if the motion to dismiss is not granted, that this Court affirm the decision of the Supreme Court of the State of Indiana on the ground that the questions on which the decision of this cause depends are so insubstantial as to need no further argument, all as appears in the Statement of Grounds Making Against the Jurisdiction of this Court filed herewith.

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